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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1980

No. 80-6397

RICHARD GRAHAM,

Petitioner,

ORIGINAL COPY

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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POINT I

Payton vs New York, 45 U.S. ___, 100 S. Ct. 1371, does not state a new constitutional principle.

Respondents and the Courts of New York State which have refused to apply Payton vs New York, 45 U.S. ____, 100 S. Ct. 1371, to appeals pending at the time of the Payton decision do so on the basis that Payton states a "new constitutional doctrine." (Respondents' Brief, p. 2).

It is respectfully submitted that Payton does not state a new constitutional decision. Rather, Payton iterates an unbroken requirement for a warrant or exigent circumstances to enter a citizen's home.

In its recent decision in Steagald vs United States, _____ U.S. ____, _____ S. Ct. ____, 29 Cr.L. 3007, decided April 21, 1981, this Court coupled Payton with Johnson vs United States, 333 U.S. 10, decided 22 years earlier:

> The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See Payton vs New York, 445 U.S. 573 (1980); Johnson vs United States, 333 U.S. 10, 13-15. (1948). (Steagald vs United States, supra, ___U.S. at ____, 28 CrL at 3009.) (Emphasis supplied.)

Immediately thereafter this Court coupled Payton with cases covering 55 years:

> Thus, as we have recently observed, "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Payton v. New York, supra, at 590. See Coolidge v. New Hampshire, 403 U.S. 443, 474-475, 477-478 (1971); Jones v. United States, 357 U.S. 493, 497-498, (1958); Agnello vs United States, 269 U.S. 20, 32-33 (1925). (Steagald vs United States, supra, ____ U.S. at ___, 28 CrL at 3009.)

Petitioner has urged from the very first that the entry into his room and his subsequent arrest were illegal under existing principles of constitutional law. His position was confirmed in Payton.

Payton announced new law only to the extent that it rejected a new constitutional reading by the New York Court of Appeals. In terms of continuing principle, Payton did not announce new law.

Therefore, the principles stated in Payton should be applied herein. The imperatives that led this Court to reverse Petitioner's conviction once require reversal again.

POINT II

The search in this matter has already been held unconstitutional in People vs Lucas, ____N.Y.2d ____, ____N.Y.S.2d ____, decided March 26, 1981.

Petitioner and Richard Lucas, his alleged co-conspirator, were arrested in adjoining motel rooms at exactly the same moment, under exactly the same circumstances.

A single, consolidated suppression hearing was held. The Trial Court and the Appellate Division upheld the search in both cases.

The New York Court of Appeals has now held that the search was unconstitutional and has reversed Lucas' conviction:

> The trial court also erred in refusing to suppress certain items of physical evidence which were seized from defendant's Florida motel room immediately after his arrest. The seized items included: a brown briefcase purportedly owned by Graham, a black briefcase purportedly owned by defendant, a safe deposit box key for a box registered in defendant's name, receipts for American Express Travelers' Checks issued to defendant, a card showing defendant's and Graham's addresses and several Western Union receipts for money orders allegedly sent by defendant to friends in New York. As the People have candidly conceded, the warrantless search of defendant's motel room was "overbroad", extending far beyond the permissible scope of a search incident to a lawful arrest (see Chimel v California, 395 US 752). Hence, the evidence seized during the course of the search must be suppressed. We note, however, that any information related to the suppressed physical evidence which the police legitimately obtained through independent sources may be used in evidence against defendant if the People decide to retry him on the remaining murder count. (People vs Lucas, supra, pp. 3-4 of slip decision attached hereto as Exhibit A.)

There is no constitutional justification for a State to apply opposite interpretations of law to the same set of facts to the advantage of one defendant and disadvantage of another.

This is not a case of different verdicts at different trials or of disparate sentences for the same crime. This is a case where courts sitting on the same record have held the same search constitutional as to one defendant and unconstitutional as to another,

without a single distinguishing fact. Such holdings deny this Petitioner both due process and equal protection under the Fourteenth Amendment.

POINT III

This case is not distinguishable from Payton vs New York.

Before this Court's decision reversing Payton, Respondents successfully argued below and in People vs Lucas that this case and Payton are indistinguishable. They were correct.

The issue is exactly the same: may the police enter a house to effect an arrest, without a warrant, without consent, and without exigent circumstances?

Respondents argue that the "lack of an arrest warrant here was more technical than procedural and not by voluntary choice on the part of the police. There was nothing more that the police could have done..." (Respondents' Brief, p. 4):

> The police could have done the very thing the Constitution requires of them: They could have obtained a warrant.

Sight should not be lost of the fact that no attempt was made to get a warrant in either Florida or New York. In neither state was any approach made to any judge.

The Respondents' attempt to isolate the police at the motel from the totality of police conduct. Respondents would have the request by the New York police in Florida to the New York police in New York become the equivalent of an application to a magistrate. However, the police talking to the police is not the constitutional equivalent of an application for a warrant to a magistrate.

The teletype relied on by the People does not state that a warrant had been issued; in any event, no warrant had in fact been issued; therefore, Respondents cannot rely on any warrant.

By implication or by direct communication, the teletype conveyed untrue information; it was, therefore, a nullity:

> Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. (Whiteley vs Warden, 401 U.S. 560, 568.)

The teletype merely represented the police talking to themselves instead of to a magistrate.

POINT IV

There has been no finding of exigent circumstances to justify a warrantless search.

At page 10 of their brief Respondents claim that the "Trial Court and Appellate Division found the existence of exigent circumstances permitting the noticeless and warrantless arrest." This statement is not supported by the record.

Neither Court found exigent circumstances justifying a warrantless arrest.

The Courts below only found exigent circumstances to justify a noticeless entry.

The Respondents are more accurate at page 8 of their brief where they state:

> ...the Court did not specifically address the issue of exigent circumstances and more particularly as to what facts would constitute such,...

Had the Courts below found exigent circumstances, it would have been able to affirm Petitioner's conviction within the framework of Payton. Rather, on remand, the Appellate Division affirmed on the basis of the non-retroactivity of Payton.

There has been no finding of exigent circumstances to justify a warrantless arrest; therefore, Petitioner's conviction should be reversed on the basis of Payton.

POINT V

The Respondents acknowledge that the Lincoln was searched a second time based on Petitioner's confession.

At page 15 of their brief, Respondents acknowledge that the Lincoln "was again dusted for additional fingerprint evidence based upon information stemming from the defendant's confession."

Therefore, the fingerprints are the fruit of Petitioner's confession which is the fruit both of the illegal search and the illegal arrest. Therefore, the fingerprints should be suppressed.

CONCLUSION

It is respectfully urged that Petitioner's application for a writ of certiorari should be granted.

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